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Filing date: **07/18/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198483
Party	Plaintiff PsyBar LLC
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Submission	Other Motions/Papers
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Signature	/s/ James J. Kretsch, Jr.
Date	07/18/2012
Attachments	2012.07.19 AFFIDAVIT OF JJK IN SUPPORT OF PSYBAR'S Reply and Memorandum of Law in Support of SJ.pdf (7 pages)(257965 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PsyBar, LLC,

Opposer,

v.

David Mahony, PhD.,

Applicant.

Opposition No.: 91198483

Serial No.: 85095429

**AFFIDAVIT OF JAMES J. KRETSCH,
JR. IN SUPPORT OF OPPOSER
PSYBAR, LLC'S REPLY AND
MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

I, James J. Kretsch, Jr., being duly sworn on oath, hereby state as follows:

1. I am an attorney representing Opposer in the above-referenced.
2. Attached hereto is a true and correct copy of relevant, portions of Applicant's

Answers and Objections to Opposer's First Set of Interrogatories.

3. Applicant makes several assertions in his Responsive Memorandum where he bolsters PsyBari, the PsyBari test, and makes mention of how difficult it would be for him to rename the test. *See Applicant's Responsive Memorandum pg. 7 and 8.* Based on Applicant's prior sworn statements, those assertions are false. *See Exhibit A, ¶12h, 15 and 16.*

4. By his own admission, the PsyBari test is still in development, seen by a select few, currently not commercially available, and he only spends \$12.00 a month on advertisement.

5. Finally, Applicant admits that there are probably fewer than 5 visitors per year to the website www.psybari.com.

6. The aforementioned undisputed facts prove that with minimal effort, or inconvenience Applicant could forego use of the PsyBari mark without any harm whatsoever.

FURTHER AFFIANT SAYETH NOT.

Dated: July 18, 2012

s/ James J. Kretsch, Jr.
James J. Kretsch, Jr.

Subscribed and sworn to before me this
18th day of July, 2012.

s/ Nichole L. Bowen
Notary Public

{SEAL}

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
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David Mahony, Ph.D.

Opposition No.: 91198483
Serial No.: 85095429

Applicant

v.

PsyBar, LLC,

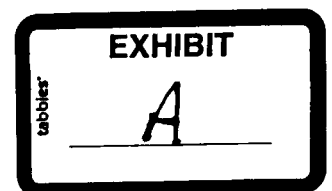
Opposer

**APPLICANT'S ANSWERS AND OBJECTIONS TO OPPOSER'S FIRST SET OF
INTERROGATORIES**

GENERAL OBJECTIONS

The following General Objections apply to Opposer's interrogatories and are incorporated by reference into the answers contained herein. The assertion of the same, similar, or additional objections, or the provision of partial answers, in response to Opposer's particular interrogatories, does not waive any of the Applicant's General Objections as set forth below.

1. Applicant objects to the interrogatories to the extent they seek copy written material that is available through third parties and the Applicant does not have permission to copy or distribute.
2. Applicant objects to the interrogatories to the extent that they seek trade secret and/or proprietary information that can negatively impact the efficacy of the Applicant's future research and clinical efforts.



the product or services authorized for sale under the agreement/contract and identify the parties to and effective date of said agreement/contract.

Answer: No commercial products or services have been sold with the PSYBARI mark. The PsyBari is used by researchers that evaluation bariatric surgery candidates for research/data collection purposes.

12. Describe in detail all products and services that are, were, or will be offered or sold by you or any licensee for each year from 2001 to the present under the mark PASYBARI or any other mark including:

- a. The mark under which each such product or service is, was or will be offered or sold;
- b. The nature and price of each such product or service;
- c. The intended purchasers of each such product or service;
- d. The channels of distribution for each such product or service;
- e. The date on which each such product or service was first offered and first sold by you;
- f. The geographical area in which such product or service is, was or will be offered or sold;
- g. Whether such product or service is still offered or sold by you; and
- h. The total annual sales in dollars and units of each such product or service.

Answer: No commercial products or services were sold using the mark PSYBARI between 2001 and the present, 2011. The PsyBari test will be commercially available in the future using the mark PSYBARI. The PsyBari is a psychological test used to assess bariatric surgery patients. The intended users/purchasers are

clinical psychologists that do evaluations with bariatric surgery candidates. The PsyBari will be offered on the Internet. No price has been set for clinicians. The PsyBari has been used since 2002 by clinical psychologists that assess bariatric surgery candidates to collect data for research purposes. PsyBari use is limited to adult, English speaking bariatric surgery candidates.

13. State whether you have received any inquiries as to whether any product or service furnished by Opposer PsyBar, LLC is associate with, sponsored by, or in any manner connected with you or you company. If the answer is anything other than a categorical, unqualified no, state:

- i. The identity of the person making each such inquiry;
- j. State the date and substance of each such inquiry;
- k. Identify the party to whom each such inquiry was made; and
- l. Identify any documents concerning each such inquiry.

Answer. The answer is a categorical and unqualified no.

14: Identify and describe any lawsuit or Patent and Trademark Office opposition or cancellation proceeding (other than the present proceeding) in the United States in which you are or have been a party involving or relating to the use or registration of a mark that consists of or contains the word PSYBAR.

Answer: None exist.

15: Identify each item of promotional literature, sales literature or advertising produced by or for you for distribution in the United States in which the designation PSYBARI or PSYBAR is referred to or appears, and for each such item of literature or advertising;

- a. State the dates of such production and distribution of each item;
- b. State the number of each item produced and the number distributed;
- c. State the categories or persons and organizations to whom copies of each item were distributed; and
- d. Identify all documents (including but not limited to purchasers, invoices, correspondence and other material) concerning the creation of copy and layout for each item of such literature or advertising, and concerning the printing of each such item.

Answer: On August 8th, 2005, www.psybari.com was registered and became publicly available.

- 16: State, on a month-to-month basis, your actual advertising and promotional expenditures from 2001 to the present relating to goods or services offered or distributed by you or any licensee in the United States bearing the mark PSYBAR or PSYBARI. For each such month, indicate the state in which such expenditures were made and the amount of the expenditures in each such state, and the amount of any such expenditures for national advertising and promotion.

Answer: www.psybari.com website costs approximately \$12 per month to maintain.

- 17: Identify all facts and circumstances evidencing, relating to or referring to your policing or enforcement efforts with respect to the PSYBARI mark.

Answer: In June of 2010, David Fischer, from PsyBar LLC, requested \$500 for "legal fees" for the Applicant's use of the mark PSYBARI (a mark that Dr. David Fischer does not own) by telephone and email. An application for the mark

PSYBAR, (11) Internet search results for entities that include PSY in their name and engage in activities related to mental health, (12) Internet search results for entities that include BARI in their name and engage in activities related to food, obesity, weight loss, and/or weight loss surgery, (12) Internet search results for entities that include BAR in their name and engage in legal or forensic activities, (13) the PsyBari test.

22: Identify the annual number of visitors by year that have visited the website

www.psybari.com

Answer: Unknown, based on the number of phone calls received, less than 5 per year.

Dated: _____

10/17/11

David Mahony, Ph.D.

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